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No. 381

In The

SUPREME COURT OF THE UNITED STATES

GAULEY-EAGLE COAL AND COKE COMPANY,
Petitioner,

v.

T. J. BLAIR, Jr., J. N. BERTHY, Jr., and JOHN L. DICKINSON,
Respondents.

Petition for Writ of Certiorari Directed to the Supreme Court of Appeals of West Virginia

BROOKS B. CALLAGHAN,
Attorney for Petitioner.

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Petition for Writ of Certiorari Directed to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Gauley-Eagle Coal and Coke Company, a West Virginia corporation, respectfully shows as follows:

I

SUMMARY STATEMENT OF THE MATTERS INVOLVED

ASSIGNMENT OF ERRORS

A writ of certiorari is sought in order to give this Court an opportunity to review the record in this case and correct errors in the final decision and decree of the Supreme Court of Appeals of West Virginia filed and entered herein

on June 21, 1949, with petition for rehearing denied on July 28, 1949.

The error chiefly complained of on this application is that the State appellate court, by its above decree, cancelled, set aside and held for naught this petitioner's coal-operating lease of June 21, 1947, upon the undivided two-thirds interest of the plaintiffs T. J. Blair, Jr. and J. N. Berthy, Jr., in a tract of 4700 acres—without any pleading, prayer, request, issue or evidence for such holding, and although all parties had conceded such lease upon such interest, and although the court itself had confirmed the same throughout its written opinion until the last paragraph where it ordered partition of the 11,000 acre tract, of which the 4700 acres is a part, "free of the alleged lease on a tract of 4700 acres thereof" (thus cancelling petitioner's unquestioned lease upon the two-thirds interest of Blair and Berthy)—thus taking this petitioner's property without notice or opportunity to be heard on that subject, in violation of the Fourteenth Amendment to the Constitution of the United States relating to due process of law.

NATURE OF CASE AND RULINGS

This suit in chancery was instituted August 22, 1947, (Summons, R-12) in the Circuit Court of Nicholas County, West Virginia, for the purpose of obtaining partition of a tract of 11,000 acres of land, in fee, located in that County. The plaintiffs, T. J. Blair, Jr. and J. N. Berthy, Jr., each owned an undivided one-third interest, and the defendant John L. Dickinson likewise owned an undivided one-third interest (Bill, R-13, 96). This petitioner was joined as a

party defendant because of its interest as lessee in the 4700-acre southern portion of the 11,000 acre tract.

This petitioner filed its answer praying affirmative relief on October 7, 1947, having process issued and served, and alleging that the two plaintiffs and their respective wives had made, executed and delivered unto petitioner a coal-operating lease dated June 21, 1947, covering the plaintiffs' undivided two-thirds interest in the 4700 acres, exhibiting a copy (R-21 et seq.), and the original lease bearing the signatures was introduced in evidence (R-367). In the evidence Berthy (R-441) and Blair (R-505) testified to their execution of this lease. Neither the existence of this lease nor petitioner's estate thereunder was ever disputed or attacked by any of the parties thereto at any stage of the case.

Also petitioner's answer (R-21 et seq.) alleged that the defendant John L. Dickinson had likewise promised and agreed on his part to make, execute and deliver unto petitioner a like lease upon his undivided one-third interest in the same 4700 acres, alleged petitioner's possession and valuable improvements in reliance thereon, and Dickinson's wrongful refusal to perform, and prayed for specific performance of that contract and for full protection of its interests in the property upon any partition. And for the protection of a lease in case of partition, W. Va. Code, Sec. 7, Art. 5, Chap. 37 provides:

> "Lessee.—Any person who, before the partition or sale, was lessee of any of the lands divided or sold, shall hold the same of him to whom such land

> is allotted or sold, on the same terms on which, by his lease, he held it before the partition."

Voluminous evidence was taken on the issue of specific performance of this contract for a lease on Dickinson's one-third interest. The trial court decreed specific performance (Opinion, R-108; Decree, R-115). Dickinson petitioned for and obtained an appeal to the Supreme Court of Appeals of West Virginia (R-1, 10).

On appeal, that court reversed the trial court on the issue of specific performance of the contract for the lease upon Dickinson's one-third interest. However, as to this petitioner's lease upon the two-thirds interest of Blair and Berthy, the court said and held (Opinion, R-.....):

> "After the breakdown in negotiations for a lease upon which all the owners could agree, they [Blair and Berthy] have felt that they could best protect their interests by the execution of the lease prepared by Callaghan at the instance of Gauley-Eagle. *At any rate, they did so, and their right to do so can not be questioned.*" (Emphasis supplied.)

And this holding was in accordance with established law, for in *Hamrick* v. *Nutter* (1925) 98 W. Va. 645, 127 S. E. 505, it was held, "a coal mining lease executed by one of several cotenants, while not binding on the others, is valid between the parties thereto".

And yet in the last paragraph of its opinion in the case here the court directed:

> ". . . the partition or sale of the 11,000 acre tract of land, described in the pleadings in this cause, *free of the alleged lease on a tract of 4700 acres thereof, set up herein* . . ." (Emphasis supplied.)

This holding not only denies specific performance as to the lease on the Dickinson one-third interest but also cancels and annuls the unquestioned lease on the Blair and Berthy two-thirds interest.

FEDERAL QUESTIONS—WHEN AND HOW RAISED AND RULED UPON

Believing at the time that the cancellation of the lease on the two-thirds interest was an oversight, especially since it was done without comment, discussion or reason in the opinion and done without any notice from the pleadings or evidence and after being unequivocally approved by the court itself, this petitioner filed its petition for rehearing, specifically and explicitly pointing out the taking of petitioner's property without due process, i. e. without any notice or opportunity to be heard—see Petition for Rehearing. But the court denied the petition on June 28, 1949.

This federal question was clearly raised by the assignment of the following point of error in the Petition for Rehearing:

> "1. The Court without due process of law cancelled, set aside and held for naught Gauley-Eagle Coal & Coke Company's written coal-operating lease of June 21, 1947, upon the undivided two-thirds interest of T. J. Blair, Jr. and J. N. Berthy, Jr. in the 4700 acre tract—without any pleading, prayer, request or evidence for such holding, and although all parties had conceded such lease on such interest, and although the Court itself had confirmed the

same throughout its opinion until the last paragraph where it ordered partition of the 11,000 acres 'free of the alleged lease on a tract of 4700 acres thereof' (thus cancelling petitioner's lease upon the unquestioned two-thirds interest of Blair and Berthy) —all in violation of both Constitutions (being the Fourteenth Amendment to the Constitution of the United States and Article III, Section 10, of the Constitution of West Virginia, which relate to the due process of law).

The petitioner's Brief in Support of Petition for Rehearing was even more explicit to the following effect:

"If this Court reads Gauley-Eagle's Petition for Rehearing and this supporting memoranda, it will see immediately grave errors involving due pocess, and, therefore, Federal Questions, which it will desire to have reviewed and to have corrected here and now, and not upon further appeal.

I

"The present decision takes from Gauley-Eagle its written, executed, acknowledged and delivered lease upon the undivided two-thirds interest of Blair and Berthy in the 4700 acres.

"That is the present holding. In the last paragraph, it orders partition of the 11,000 tract 'free of the alleged lease on a tract of 4700 acres thereof'—not just free of lease upon the one-third of John L. Dickinson therein, but all interests therein, including the two-thirds of Blair and Berthy.

"This Court has no jurisdiction to make such a holding. Such holding is not supported by any pleading, prayer or evidence. In short, Gauley-Eagle had no notice and no opportunity to be heard

on that matter. This is a plain, pointed, conspicuous denial of due process.

"Furthermore, Gauley-Eagle's lease on the Blair and Berthy two-thirds interest was not only conceded by all parties, but also this Court in this opinion confirms that lease right down to the last paragraph, stating on page 32—'* * * they (Blair and Berthy) may have felt that they could best protect their interests by the execution of the lease prepared by Callaghan at the instance of Gauley Eagle. At any rate, *they did so, and their right to do so can not be questioned.*'

"Then without any stated grounds, reason or even discussion, this lease is cancelled and set aside in the last paragraph of the decision, and partition is ordered free of that lease."

The petitioner in its Petition for Rehearing also assigned another substantial error raising a federal question, but its presentation here would require some extended reference to the evidence and briefs, whereas the error and federal question referred to above are self-evident and, considered alone, would seem sufficient. However, to to comply with the rule of this court requiring all issues upon which decision is requested to be presented in the petition for certiorari, petitioner here refers to and incorporates into this petition the second point of error assigned in its Petition for Rehearing in the court below, included in the transcript herein, to the same effect as if herein set out in full.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States upon certiorari is invoked under Section 237(b) of the Judicial Code (28 U. S. C. 344).

Cases sustaining the jurisdiction for allowing the writ and awarding review are all that line of cases holding that the federal question may be raised first on petition for rehearing, among which cases are the following:

Grannis v. *Ordean*, 234 U. S. 385, 58 L. Ed. 1363, 34 S. C. R. 779.

Coal Co. v. *Bd. of Revision*, 284 U. S. 23, 76 L. Ed. 146, 52 S. C. R. 48.

II

REASONS RELIED ON FOR GRANTING THE WRIT

That error exists is apparent. That the error is a violation of due process is also apparent.

That the decision of the lower court is not in accord with any decision of this Court, requiring notice and opportunity to be heard under the Due Process Clause, is clear.

That the question presented is substantial readily appears. In the first place, such a decision, standing as a precedent, would be a most dangerous innovation in a state such as West Virginia where coal-operating leases form such an integral part of its economic and social existence. Standing as a precedent, the present decision would also be a dangerous innovation in judicial procedure —if an appellate court may thus destroy or transfer property with no prior notice by any pleading or evidence and with the resulting lack of any opportunity for the interested party to be heard. Considered alone from the standpoint of financial interest to this petitioner, this is no

small matter. A coal lease upon 4700 acres with a guaranteed minimum royalty of $24,000 per year is a substantial property. In reliance upon the lease on the two-thirds interest of Blair and Berthy or upon the agreement therefor which was performed and in reliance upon what this petitioner and the trial court thought was an enforcible contract for a lease upon the one-third interest of Dickinson, this petitioner brought onto the property equipment valued at $450,000. (R-131), constructed railroad siding at an expense of $20,000. coal tipple at an expense of $85,000. and roads at an expense of $40,000. to $45,000. (R-332).

Since the federal question is so apparent and its substantial nature is likewise so apparent, the petitioner is of the opinion that a supporting brief would be surplusage and, therefore, waives its right to file such brief.

PRAYER

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of West Virginia, commanding that court to certify and to send to this Court for review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Supreme Court of Appeals of West Virginia be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BROOKS B. CALLAGHAN,
Counsel for Petitioner.

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CASES CITED

None

STATUTES CITED

None

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

UPON
PETITION FOR WRIT OF CERTIORARI
No. 381

GAULEY-EAGLE COAL & COKE COMPANY,
a corporation, *Petitioner*

vs.

T. J. BLAIR, Jr., J. N. BERTHY, Jr.,
and JOHN L. DICKINSON,
Respondents.

BRIEF ON BEHALF OF JOHN L. DICKINSON, RESPONDENT, IN OPPOSITION TO WRIT OF CERTIORARI.

I. PETITIONER'S FIRST ASSIGNMENT OF ERROR

(Petition, pp. 2-7)

The "error chiefly complained of" by petitioner Gauley-Eagle Coal & Coke Company is that the Supreme Court of Appeals of West Virginia set aside and held for naught a coal-operating lease to Gauley-Eagle of an undivided two-thirds interest of respondents Blair and Berthy in a tract of 4700 acres of land, and that thereby petitioner was denied due process of law (Petition, p. 2). The lease was dated June 21, 1947, and

was executed by Blair and Berthy but not by Dickinson who owned the other undivided one-third interest. As a matter of fact, the lease was not set aside or in any way affected under the decision of the state court and petitioner's assignment of error is therefore utterly without any basis to support it. This appears plainly from the opinion of Judge Fox (R. 842-A), replying for the majority to the dissent of Judge Kenna (R. 828). The former, in speaking of the majority opinion, says in the reply opinion:

> "* * * The language employed was not intended to, and, given a reasonable construction in the circumstances of the case, did not affect in any way, as between Blair and Berthy on the one hand, and Gauley-Eagle on the other, their respective rights under the lease [of June 21, 1947] between them. This Court did not assume to pass on this question, because it was in no way involved in the case, and was not, and could not, have been presented for decision either in the trial court or in this Court. That question, if it is ever raised, will have to be determined in a future suit or proceeding, unaffected by the decision we have made in the case at bar.
>
> "This memorandum is written to make clear the intended meaning of the language of the majority opinion referred to above; and further to make defense to the implications involved in the contentions that, without excuse or attempted justification, we assumed to decide issues not presented in the case, and attempted to destroy what may be valuable property rights without giving interested parties their day in court. We are unwilling to permit such an interpretation of the opinion filed by us to go unchallenged." (R. 842-B, 842-C).

The petition ignores entirely the reply opinion. That opinion unquestionably refutes the contention of petitioner.

It may be added that a fair or reasonable interpratation of the majority opinion (R. 785) alone and in itself precludes any such conclusion as to its effect as that sought by petitioner. Speaking of such conclusion and also that of Judge Kenna to the same effect (R. 828), the reply opinion states:

> "It seems, however, that Judge Kenna, and, (as appears from petitions for rehearing filed herein) counsel for the appellees, construe the language employed as an attempt to nullify and make ineffective the lease on the 4,700 acres, aforesaid, executed by Blair and Berthy to Gauley-Eagle, dated June 21, 1946. *How, in the circumstances of this case, they find themselves able to reach this conclusion, is beyond our comprehension.*" (Emphasis supplied, R. 842-B).

II. PETITIONER'S SECOND ASSIGNMENT OF ERROR

(Petition, p. 7)

This assignment is not argued (Petition, pp. 8-9) and is only made by reference to the petition for rehearing which was filed by petitioner in the state appellate court (R. 844). The assignment of error, as stated in the contemptuous and contemptible language of the petition for rehearing, is that "The court denied Gauley-Eagle Coal & Coke Company an opportunity to be heard on this appeal by failing, neglecting and refusing to read, weigh or consider its evidence or its brief" (R. 845). The evidence, which petitioner alleges

that the state court failed, neglected and refused to consider, relates (1) to a supposed agency on the part of respondent Berthy to bind respondent Dickinson for a lease of the latter's one-third interest in the 4700 acre tract, and (2) to a supposed parol agreement between the parties, viz., Blair, Berthy and Dickinson as prospective lessors and Gauley-Eagle as a prospective lessee, entered into on June 6, 1947, for a lease of the 4700 acre tract (R. 846-7).

Before proceeding to a discussion of the evidence mentioned by petitioner, it may be observed that petitioner's charge—directed at the Supreme Court of Appeals of West Virginia in the reprehensible language above quoted and imputing dereliction of duty to that court—is amply refuted by the majority and reply opinions which were filed (R. 785, 842-A). It is obvious therefrom that the law and facts of the case were carefully and meticulously considered and weighed.

(1) Agency of Berthy

Petitioner complains that the state appellate court found that "It was not, as we understand the record, claimed by any one that Berthy had any authority to bind his co-owners, even if he had assumed to do so; and we do not understand that he ever claimed such authority." (R. 846, 850). This finding is clearly supported by petitioner's affirmative answer seeking relief against respondent Dickinson (R. 21). This pleading contains no allegation that Berthy made a lease on behalf of Dickinson or that he was even authorized to do so. It completely refutes any idea that Berthy made a lease as agent for Dickinson, as appears

from its allegation, "That this defendant [Gauley-Eagle, petitioner,] negotiated a coal-operating lease upon said 4700 acre tract with said three owners [Blair, Berthy and Dickinson] upon terms and conditions which said owners represented to the defendant to be satisfactory with and accepted by them; that the defendant John L. Dickinson, at the conclusion of a negotiation meeting in the month of June, 1947, [viz., June 6], told the President [Maust] of this defendant Company that the terms of the lease were satisfactorily agreed upon and then and there directed the President of this defendant Company to return on a later date and sign the lease" (R. 24, art. v). The prayer is "that the said John L. Dickinson be required specifically to perform his said agreement, and to execute and deliver to this defendant the lease aforesaid on his part" (R. 25).

In spite of the lack of any allegation in its affirmative answer that Berthy was authorized to, or did, make a lease of the 4700 acre tract on behalf of Dickinson—and in spite of the allegation as to the June 6 meeting and the prayer for specific performance of the supposed agreement reached at that meeting—petitioner seizes upon the statement from the opinion of the state court, *ante*, p. 4, and then proceeds to cite evidence (R. 851) purportedly showing that Berthy had authority to bind Dickinson for a lease of the 4700 acre tract. The statement from the opinion, upon which petitioner relies to support its claim of denial of due process of law, follows a resume' of what occurred prior to "the crucial conference of June 6, 1947" at which petitioner claims a parol contract was entered into for a lease of the 4700 acre tract (R.

802-4). That resume' shows no authority in Berthy to bind Dickinson to a lease.

The very evidence which petitioner cites (R. 851) to prove that Berthy was an agent to make a lease for Dickinson, shows that Berthy was merely authorized to obtain a lessee for the property and to give assurances to petitioner, as a prospective lessee, that it could have acreage additional to a 404 acre tract which it was operating, and that, "whenever anything came up about the land or anything, why he [Berthy] always worked it out" (R. 323). That evidence, as cited by petitioner and, in contrast, as contained in the record, is set out in the appendix to this brief. An examination of the Appendix will disclose that the quotations used by petitioner (R. 851) are incomplete and misleading, and that they conceal the true meaning of the evidence. There is no evidence that Berthy was authorized to make a lease on behalf of respondent Dickinson or that he attempted to make such lease.

Everything that transpired prior to the June 6 meeting, including anything done by Berthy purportedly on behalf of Dickinson, was solely preliminary to the making of a lease. Berthy's authority to act on behalf of dickinson was only with respect to preliminary matters. All this is admitted by petitioner in its brief in support of its petition for a rehearing wherein petitioner states:

> "After months of preliminaries agreeably conducted by John L. Dickinson in person and by his agent Berthy, who had complete, express, implied and apparent authority, on June 6, 1947, the parties had a full and complete agreement and meeting of the minds on the Callaghan

lease (which was a complete lease used throughout the Gauley Field) plus five agreed amendments. * * *" (R. 852).

Furthermore, it is significant that petitioner states that the only question is, was there a meeting of minds on June 6, 1947 (R. 853). This statement eliminates all question as to the extent of Berthy's agency.

(2) Alleged Parol Agreement of June 6, 1947

Referring to the meeting at which an agreement for a lease was supposed to have been reached—which agreement was the basis for specific performance as prayed for by petitioner (R. 25, art. VI)—petitioner says, "The whole question of specific performance boils down to one question. All else, such as possession, improvements, etc. are conceded.* Only one question is controverted in any way. That question is—

"Was there a meeting of the minds accepting the Callaghan lease plus five agreed amendments?" (R. 853).

Petitioner argues that whether there was a meeting of minds is a question of fact and that the state court, in holding that there was no meeting of minds, decided against the weight or preponderance of the evidence which was in favor of petitioner (R. 853-4). To sustain its agreement, petitioner would have the state court consider only such evidence, as to what oc-

*Respondent Dickinson denies this statement. The issue, however, is immaterial on the question of allowance of certiorari.

curred at the June 6 meeting, as was favorable to petitioner, and would have that court disregard all inferencs, unfavorable to petitioner, which might be drawn from what occurred and also disregard all preexisting, concurrent and subsequent facts and circumstances relating to the supposed agreement (R. 853-4). This the state court refused to do and such refusal appears to be the basis for petitioner's claim of denial of due process of law. Such refusal was fully justified—in fact, it was required—under the ordinary rules of evidence, as appears from the opinion of the court (R. 805-23).

Petitioner has attempted to raise the question of due process of law with respect to the alleged action of the state court in setting aside the lease to petitioner of the undivided two-thirds interest of Blair and Berthy in the 4700 acre tract. The majority opinion affords no support for such attempt. The reply opinion, to the effect that no adjudication was made respecting the validity of the lease, completely forestalls such attempt. See *ante* pp. 2, 3.

The questions as to the agency of Berthy and as to the supposed agreement of June 6, 1947, do not involve denial of due process of law. Petitioner was afforded a full hearing on these questions, and consideration of the law and evidence relating thereto, by the state appellate court. That court decided the questions in accordance with local state law and conformable to

generally accepted legal principles. Petitioner can ask nothing more.

Respectfully submitted,

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APPENDIX CONTAINING EVIDENCE QUOTED BY PETITIONER (R. 851) AS COMPARED WITH EVIDENCE CONTAINED IN THE RECORD

Portions of Evidence Omitted by Petitioner are in Italics

As quoted by petitioner:

"Q. . . . did John L. Dickinson expressly authorize you . . ."

"A. He did . . ."

The foregoing question and answer as appearing in the record (pages 413-14):

"Mr. Callaghan: Q. *At any time, Mr. Berthy,* did John L. Dickinson expressly authorize you *to get an operator, a coal operator on the property?*

"A. He did. *Some time in the summer or early fall of 1945 I inquired what progress he was making in his negotiations on a lease with Mr. Garner Williams of the Truax-Traer Coal Company, and he said it looked like that had dropped through with. I kidded him a little on his salesmanship, and he says, 'Well, you go ahead and get your operators'.*"

As quoted by petitioner:

"Q. Did you have authority from the other two owners . . ."

"A. I had the word of Mr. Blair . . . he was in contact with Mr. Dickinson and it was okay."

The question and answer next above as appearing in the record, pages 422-3:

"Q. *Did you discuss with Mr. Maust an effort to get the railroad to institute a condemnation proceeding?*

"A. *I did.*

"Q. Did you have authority from the other two owners *to have that done?*

"A. I had the word of Mr. Blair *that we should do anything we could to encourage the Railroad Company to go along and do that job, and that* he was in contact with Mr. Dickinson and it was okay."

As quoted by petitioner:

"Q. . . . were you fully authorized by and on behalf of the other two owners . . ."

"A. I was."

The question and answer next above as appearing in the record, page 430:

"Q. *Now, prior to the completion of this road and prior to the operations off the 400-acre tract and on to the 11,000-acre tract by the Gauley-Eagle Coal & Coke Company, had you given that company full assurance that it would be protected in additional acreage on this operation?*

"A. *I did. I had explained to Mr. Dickinson and Mr. Blair that the acreage was so very limited—the acreage of coal—let me correct that—was so very*

limited that it didn't warrant expenditures I had told them before it wouldn't warrant for development to realize the tonnage that we wanted out of that property.

"Q. *When you gave such assurances to the Gauley-Eagle Coal & Coke Company* were you fully authorized by and on behalf of the other two owners to make such commitment?

"A. I was."

As quoted by petitioner:

" . . . he (Berthy) represented the other owners . . ."

The question and answer next above as appearing in the record, page 323:

"A. *Well, when we were informed that we could have whatever acreage there that we wanted to operate—*

"Q. *Who informed you that?*
"A. *J. N. Berthy.*

"Q. *He was one of the owners, as I understand?*
"A. *He was one of the owners.*

"Q. *What was your understanding about his relationship to the others, Mr. Maust?*
"A. *Well,* he represented the other owners. *I mean, all our dealings were with him, and everything that came up about the land or anything, why, he always worked it out.*"